

**Fiscal Impact Statement:**

The South Carolina Department of Agriculture estimates that there will be no anticipated additional costs to the State or its political subdivisions regarding the implementation and update of standards used by the Department for the regulation and administration of the Weights and Measures program.

**Statement of Rationale:**

The purpose of this proposal is to improve and update Regulation 5-500 et seq., concerning the standards used by the Department, as well as the administration of the South Carolina Weights and Measures program, S.C. Code section 39-9-70. These amendments are intended to provide uniform standards and guidance for the Department related to the Uniform Weights and Measures Law, section 39-9-10 et al. This proposal is reasonable in that it is the Department's responsibility and duty to implement regulations that are required by law, and to update them so that they remain consistent with the law.

Document No. 3175

**BUDGET AND CONTROL BOARD****CHAPTER 19**

Statutory Authority: 1976 Code Section 11-35-10 et seq.

19-445. South Carolina Procurement Regulations

**Synopsis:**

The Consolidated Procurement Code authorizes the State Budget and Control Board to promulgate regulations governing the procurement, management, control, and disposal of any and all supplies, services, information technology, and construction to be procured by the State and any other regulations relating to implementation of Title 11, Chapter 35. (Sections 11-36-60 & -540(1)) These regulations are proposed to clarify and improve the procedures used in procurement. The proposed changes also adapt the regulations to proposed legislative changes (S. 282 of 2007). If enacted, the proposed changes to the regulations would: allow the furnishing of source selection information to the Office of the State Engineer; provide that it is not practicable or advantageous to the State to procure guaranteed energy, water, or wastewater saving contracts by competitive sealed bidding; set forth standards for determining the appropriate project delivery method for construction projects; update references to standard industry form contract documents used on design-bid-build projects and provide that the Manual for Planning and Execution of State Permanent Improvements – Part II shall specify the edition of these forms to be used; permit adoption of other contract forms not specified in the regulation or otherwise required by law by publication in the Manual for Planning and Execution of State Permanent Improvements – Part II; provide for the future adoption of contract forms for alternative project delivery methods; require procurement offices to consider whether a contractor who provides a report or study will have a competitive edge in a subsequent procurement and to take appropriate steps to eliminate or mitigate the advantage; establishes important best practices for procuring such services by competitive sealed proposals by setting standards for the contents of a request for proposals, including design requirements and evaluation factors; require a solicitation to include any requirements for errors and omissions insurance; address performance bonds or letters of credit covering the operations period performance requirements; provide standards for soliciting CMR services and evaluating proposals; modify the Surplus Property Regulations to conform to present organizational structure, address electronic sales and clarify the definition of junk.

**Instructions:** The following items or sections of Regulation 19-445 are added, deleted, or modified as provided below. All other items and sections remain unchanged.

~~Indicates Matter Stricken~~

Indicates New Matter

## 22 FINAL REGULATIONS

### Text:

19-445.2010. Disclosure of Procurement Information.

A. - C. [Remains the same.]

D. Throughout the competitive sealed proposal process, state ~~and non-state~~ personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law.

E. - G. [Remains the same.]

H. Subject to item (E), any person may furnish source selection information to the Office of the State Engineer. The procurement officer shall provide to the Office of the State Engineer any information it requests regarding a procurement.

19-445.2095. Competitive Sealed Proposals.

A. - E. [Remains the same.]

F. Specified Types of Construction.

Consistent with Section 48-52-670, which allows the use of competitive sealed proposals, it is generally not practicable or advantageous to the State to procure guaranteed energy, water, or wastewater savings contracts by competitive sealed bidding. Pursuant to Section 11-35-3020(1), and subject to the approval requirements of Section 11-35-3010, construction may be procured by competitive sealed proposals as follows:

- ~~(1) Architect/Engineer services and construction services to be awarded in the same contract for an indefinite delivery of a specialized service (e.g. Hazardous waste remedial action).~~
- ~~(2) Design/Build or Lease Purchase contracts where there must be selection criteria in addition to price.~~
- ~~(3) Energy conservation or other projects to be financed by vendors who will be paid from the State's savings.~~
- ~~(4) Construction, where consideration of alternative methods or systems would be advantageous to the State.~~

G. - J. [Remains the same.]

19-445.2132. Prequalification for a Single Solicitation.

A. [Remains the same.]

B. Receipt and Safeguarding of Responses

Prior to opening submittals received in response to a request for prequalification, the provisions of Regulation 19-445.2045 shall apply to the receipt and safeguarding of all such submittals received in response to a request for qualifications conducted pursuant to Sections 11-35-1520 or 11-35-1530.

19-445.2145. Construction, Architect Engineer, Construction Management, and Land Surveying Services.

### A. Definitions

(1) Designer, as used in these regulations, means a person who has been awarded, through the qualifications-based process set forth in Section 11-35-3220, a contract with the State for the design of any infrastructure facility using the design-bid-build project delivery method defined in Section 11-35-2910(6).

(2) Builder, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the State to construct (alter, repair, improve, or demolish) any infrastructure facility using the design-bid-build project delivery method defined in Section 11-35-2910(6).

(3) Design-Builder, as used in these regulations, means a person who has been awarded a contract with the State for the design and construction of any infrastructure facility using the design-build project delivery method defined in Section 11-35-2910(7).

(4) DBO Producer, as used in these regulations, means a person who has been awarded a contract with the State for the design, construction, operation, and maintenance of any infrastructure facility using the design-build-operate-maintain project delivery method defined in Section 11-35-2910(9).

(5) DBFO Producer, as used in these regulations, means a person who has been awarded a contract with the State for the design, construction, finance, operation, and maintenance of any infrastructure facility using the design-build-finance-operate-maintain project delivery method defined in Section 11-35-2910(8).

(6) Guaranteed Maximum Price (GMP) means a price for all costs for the construction and completion of the project, or designated portion thereof, including all construction management services and all mobilization, general conditions, profit and overhead costs of any nature, and where the total contract amount, including the contractor's fee and general conditions, will not exceed a guaranteed maximum amount.

(7) Independent Peer Reviewer means a person who has been awarded a contract with the State for an independent, contemporaneous, peer review of the design services provided to the State by a DBO or DBFO Producer. In the event the State does not elect to contract with the Independent Peer Reviewer proposed by the successful DBO or DBFO Producer, the Independent Peer Reviewer shall be selected as provided in Section 11-35-2910(11).

(8) Operator, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the State for the routine operation, routine repair, and routine maintenance (Operation and Maintenance) of any infrastructure facility, as defined in Section 11-35-2910(13).

#### B.A. Choice of Project Delivery Method~~Method of Construction Contract Administration.~~

(1) This Subsection contains provisions applicable to the selection of the appropriate project delivery method of administration for constructing infrastructure facilities~~construction contracts~~, that is, the ~~contracting method of configuring and administering construction projects and configuration~~ which is most advantageous to the State and will result in the most timely, economical, and otherwise successful completion of the infrastructure facility construction project. The governmental body shall have sufficient flexibility in formulating the project delivery approach on a particular project to fulfill the State's needs. Before choosing the project delivery method, a careful assessment must be made of requirements the project must satisfy and those other characteristics that would be in the best interest of the State.

~~(2) Selecting An Appropriate Project Delivery Method the Method of Construction Contracting.~~  
In selecting an appropriate project delivery method for each of the State's Infrastructure Facilities the ~~construction contracting method~~, the governmental body should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all authorized project delivery methods, the comparative advantages and disadvantages of each, and how these methods may be appropriately configured and applied to fulfill State requirements. Additional factors to consider include:~~all appropriate and effective methods and their comparative advantages and disadvantages and how they might be adapted or combined to fulfill state requirements.~~

#### ~~(2) Flexibility:~~

~~The governmental body, shall have sufficient flexibility in formulating the project delivery approach on a particular project to fulfill the State's needs. In each instance, consideration should be given to all the appropriate and effective means of obtaining both the design and construction of the project.~~

#### ~~(3) Criteria for Selection:~~

~~(a) the extent to which the governmental body's design requirements for the Infrastructure Facility are known, stable, and established in writing; Before choosing the construction contracting method, a careful assessment must be made by the purchasing agency of requirements the project must satisfy and those other characteristics that would be in the best interest of the State.~~

(b) the extent to which qualified and experienced State personnel are available to the governmental body to provide the decision-making and administrative services required by the project delivery method selected;

## 24 FINAL REGULATIONS

(c) the extent to which decision-making and administrative services may be appropriately assigned to designers, builders, construction-managers at-risk, design-builders, DBO producers, DBFO producers, peer reviewers, or operators, as appropriate to the project delivery method;

(d) the extent to which outside consultants, including construction manager agent, may be able to assist the governmental body with decision-making and administrative contributions required by the project delivery method;

(e) the governmental body's projected cash flow for the Infrastructure Facility to be acquired (both sources and uses of the funds necessary to support design, construction, operations, maintenance, repairs, and demolition over the facility life cycle);

(f) the type of infrastructure facility or service to be acquired – for example, public buildings, schools, water distribution, wastewater collection, highway, bridge, or specialty structure, together with possible sources of funding for the infrastructure facility – for example, state or federal grants, state or federal loans, local tax appropriations, special purpose bonds, general obligation bonds, user fees, or tolls;

(g) the required delivery date of the infrastructure facility to be constructed;

(h) the location of the infrastructure facility to be constructed;

(i) the size, scope, complexity, and technological difficulty of the infrastructure facility to be constructed;

(j) the State's current and projected sources and uses of public funds that are currently generally available (and will be available in the future) to support operation, maintenance, repair, rehabilitation, replacement, and demolition of existing and planned infrastructure facilities;

(k) and, any other factors or considerations specified in the Manual for Planning of Execution of State Permanent Improvements, Part II, or as otherwise requested by the State Engineer.

~~(b) The amount and type of financing available for the project is relevant to the selection of the appropriate construction contracting method including what sources of funding are available.~~

~~(e) The governmental body should consider whether a price can be obtained that is fair and reasonable when considered together with the benefit to the State potentially obtainable from such a contract.~~

(3) Except for guaranteed energy, water, or wastewater savings contracts (Section 48-52-670), design-bid-build (acquired using competitive sealed bidding) is hereby designated as an appropriate project delivery method for any infrastructure facility and may be used by any governmental body without further project specific justification.

### (4) Governmental Body Determination.

The head of the governmental body shall make a written determination that must be reviewed by the ~~State Engineer~~Chief Procurement Officer. The determination shall describe the project delivery method (Section 11-35-3005), source selection method (Section 11-35-3015 and 11-35-1510), any additional procurement procedures (11-35-3023 and 11-35-3024(2)(c)), and types of performance security (Sections 11-35-3030 and 11-35-3037)~~construction contracting method chosen~~ and set forth the facts and considerations ~~leading which led to those selections of that method.~~ This determination shall demonstrate either reliance on paragraph (3) above, or that the considerations identified in paragraphs (1) and (2) above, as well as the requirements and financing of the project, were all considered in making the selection. Any determination to use a project delivery method other than design-bid-build must explain why the use of design-bid-build is not practical or advantageous to the State. Any determination to use any of the additional procedures allowed by Section 11-35-3024(2)(c) must explain why the use of such procedures are in the best interests of the State. Any request to use the prequalification process in a design-bid-build procurement must be in writing and must set forth facts sufficient to support a finding that pre-qualification is appropriate and that the construction involved is unique in nature, over ten million dollars in value, or involves special circumstances. ~~No written determination is required for projects with a total potential value of less than ten million dollars if (i) the project delivery method is design bid build, and (ii) the source selection method is competitive sealed bidding, and (iii) the contract amount is a fixed price.~~

### ~~B. Construction Procurement – The Invitation for Bids.~~

~~The provisions of Regulation 19-445.2040 shall apply to implement the requirements of Section 11-35-3020(2)(a), Invitation for Bids.~~

## C. Bonds and Security.

(1) Bid Security. Bid Security shall be a certified cashier's check or a bond, in a form to be specified in the Manual for Planning and Execution of State Permanent Improvements - Part II, provided by a surety company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. In the case of a construction contract under \$100,000, the agency may, upon written justification and with the approval of the Office of the State Engineer, allow the use of a "B+" rated bond when bid security is required. Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety.

(2) Contract Performance and Payment Bonds. The contractor shall provide a certified cashier's check in the full amount of the Performance and Payment Bonds or may provide, and pay for the cost of, Performance and Payment Bonds in a the form to be specified in the Manual for Planning and Execution of State Permanent Improvements-Part II of AIA Document A311 "PERFORMANCE BOND AND LABOR AND MATERIAL BOND". Each bond shall be in the full amount of the Contract Sum, issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. In the case of construction under \$50,000, the agency may, upon written justification and with the approval of the Office of the State Engineer, allow the use of a "B+" rated bond when bid security is required. Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety.

## D. [Remains the same.]

## E. Contract Forms.

(1) Pursuant to Section 11-35-2010(2), the following contract forms shall be used as applicable, as amended by the State Engineer, and as provided in the Manual for Planning and Execution of State Permanent Improvements-Part II. Subject to the foregoing:

(a) If an agency conducts a competitive sealed bid to acquire construction independent of architect-engineer or construction management services, the governmental body may use a document in the form of AIA Document A701.

(b) If an agency acquires architect-engineer services independent of construction, the governmental body may use a document in the form of AIA Document B151.

(c) If an agency acquires construction independent of architect-engineer or construction management services, the governmental body may use documents in the form of AIA Document A101 and A201. Other contract forms may be used as are approved by the State Engineer.

(d) If an agency acquires architect-engineer services, construction management services, and construction on the same project, each under separate contract, the governmental body may use documents in the form of AIA Documents A101/CMa, A201/CMa, B141/CMa, and B801/CMa. This paragraph does not apply if an agency acquires both construction and construction management services from the same business under the same contract.

(2) With prior approval of the State Engineer, a governmental body may supplement the contract forms identified in paragraph (1), as they have been amended by the State Engineer.

(3) Paragraph (1) does not apply to a contract entered into pursuant to Sections 11-35-1530, 11-35-1550, 11-35-3230, or 11-35-3310.

(4) For any contract forms specified herein, the Manual for Planning and Execution of State Permanent Improvements-Part II shall specify the appropriate edition or, if applicable, replacement form.

(5) For any contract forms not specified herein or otherwise required by law, the Manual for Planning and Execution of State Permanent Improvements-Part II may, without limitation, require the use of any appropriate contract document, standard industry contract form, standard state amendments to such documents or forms, or publish state specific contract forms. Absent contrary instructions in the Manual, the governmental body may use a contract written for an individual project.

## 26 FINAL REGULATIONS

~~Pursuant to Code Section 11-35-2010(2), the following Contract Forms, whose AIA Edition, if any, is designated in the Manual for Planning and Execution of State Permanent Improvement Part II, shall be used, as applicable.~~

~~(1) Contracts for Services may be as follows:~~

~~(a) Land surveyor: The agency may use a letter contract written for each individual project. The format and description of services shall be approved by the State Engineer.~~

~~(b) Architect Engineer: The agency may use AIA Document B141, with Article 12, Other Conditions or Services as prepared by the State Engineer and Article 13 prepared by the agency or Architect Engineer.~~

~~(c) Architect Engineer/Construction Management: For the Architect Engineer, the agency may use B141/CM, with Article 15 prepared by the State Engineer and Article 16 prepared by the agency or Architect Engineer. For the managers, it may use AIA Document B801, with Article 16 prepared by the State Engineer and Article 17 prepared by the agency or construction manager.~~

~~(d) Construction: the agency may use AIA Document A101, 1987 Edition or AIA Document A101/CM. Other contract forms may be used as are approved by the State Engineer.~~

~~(e) For Contracts under Procurement Code Section 11-35-3230, the agency may use a letter contract written for each individual project. The format and description of services shall be as approved by the State Engineer.~~

~~(f) For Construction under Procurement Code Section 11-35-1550, the agency may use a letter contract written for each individual project. The format and description of services shall be as approved by the State Engineer.~~

~~(2) Bidding Documents may be as follows:~~

~~(a) Instruction to bidders may be AIA Document A701, with Article 9 prepared by the State Engineer and Article 10 prepared by the agency or Architect Engineer.~~

~~(b) General Conditions of the Contract for Construction may be AIA Document A201, with Supplementary Conditions Part 2 prepared by the agency or Architect Engineer; or AIA A201/CM, with Supplementary Conditions Part 1 prepared by the state Engineer and Supplementary Conditions Part 2 prepared by the agency or Architect Engineer/Construction Manager.~~

~~(c) Bid Form and Change Order prepared by the State Engineer may be used.~~

~~(d) [None]~~

~~(6e) Construction under Procurement Code Section 11-35-1550 and 11-35-1530 may be in a format and description of services approved by the State Engineer.~~

### F. Manual for Planning and Execution of State Permanent Improvements Projects ~~Part II.~~

For the purpose of these Regulations and Code Section 11-35-3240, a manual of procedures to be followed by governmental bodies for planning and execution of state permanent improvement projects is prepared and furnished by the designated board office, and included in this regulation. Part II of this manual, covering the procurement of construction for the projects, will be the responsibility of the Office of the State Engineer.

### G. Prequalifying Construction Bidders.

In accordance with Section 11-35-~~3023~~1825, the State Engineer's Office shall develop ~~a procedures for a prequalification process and a list of criteria for prequalifying construction bidders and sub-bidders,~~ and shall include it in the Manual for Planning and Execution of State Permanent Improvements-Part II. The provisions of Regulation 19-445.2132 shall apply to implement Section 11-35-3023.

H. [Remains the same.]

### I. Construction Procurement—The Invitation for Bids.

The provisions of Regulation 19-445.2040 shall apply to implement the requirements of Section 11-35-3020(a), Invitation for Bids. The provisions of Regulation 19-445.2090(B) shall not apply to implement the requirements of Code Section 11-35-3020.

J. Participation in Prior Reports or Studies.

(1) Before awarding a contract for a report or study that could subsequently be used in the creation of design requirements for an infrastructure facility or service, the procurement officer should address, to the extent practical, the contractor's ability to compete for follow-on work.

(2) Before issuing a request for proposals for an infrastructure facility or service, the procurement officer should take reasonable steps to determine if prior participation in a report or study could provide a firm with a substantial competitive advantage, and, if so, the procurement officer should take appropriate steps to eliminate or mitigate that advantage.

(3) In complying with items (1) and (2) above, the procurement officer shall consider the requirements of Section 11-35-3245 and the Manual for Planning and Execution of State Permanent Improvements, Part II.

K. Additional Procedures for Design-Build; Design-Build-Operate-Maintain; and Design-Build-Finance-Operate-Maintain.

(1) Content of Request for Proposals. Each request for proposals (RFP) issued by the State for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services shall contain a cover sheet that: (a) confirms that design requirements are included in the RFP, (b) confirms that proposal development documents are solicited in each offeror's response to the RFP, and (c) states the governmental body's determination for that procurement (i) whether offerors must have been pre-qualified through a previous request for qualifications; (ii) whether the governmental body will select a short list of responsible offerors prior to discussions and evaluations (along with the number of proposals that will be short-listed); and (iii) whether the governmental body will pay stipends to unsuccessful offerors (along with the amount of such stipends and the terms under which stipends will be paid).

(2) Purpose of Design Requirements. The purpose and intent of including design requirements in the RFP is to provide prospective and actual offerors a common, and transparent, written description of the starting point for the competition and to provide the State with the benefit of having responses from competitors that meet the same RFP requirements. In order to be effective, the governmental body must first come to understand and then to communicate its basic requirements for the infrastructure facility to those who are considering whether they will participate in the procurement competition.

(3) Purpose of Requirement for Proposal Development Documents. The purpose and intent of including the requirement for submittal of proposal development documents in each RFP for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain is to provide actual offerors with a common, and transparent, written description of the finish point for the competition. To be responsive, each offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements).

(4) Content of Request for Proposals: Evaluation Factors. Each request for proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any by listing the required factors in descending order of importance (without numerical weighting), or by listing each factor along with a numerical weight to be associated with that factor in the governmental body's evaluation. Subfactors, if any, must be stated in the RFP and listed, pursuant to the requirements of this Regulation, either in descending order, or with numerical weighting assigned to each subfactor. The purpose and intent of disclosing the relative importance of factors (and subfactors) is to provide transparency to prospective and actual competitors from the date the RFP is first published.

(5) The Manual for Planning and Execution of State Permanent Improvement Projects - Part II must include guidelines for the proper drafting of design requirements, proposal development documents, and requests for proposals.

L. Errors and Omissions Insurance.

(1) For design services in design-bid-build procurements. A governmental body shall include in the solicitation such requirements as the procurement officer deems appropriate for errors and omissions insurance

## 28 FINAL REGULATIONS

(commonly called “professional liability insurance” in trade usage) coverage of architectural and engineering services in the solicitation for design services in design-bid-build procurements.

(2) For design services to be provided as part of design-build procurements. A governmental body shall include in the solicitation for design-build such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the head of a governmental body, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build contracts in excess of \$25,000,000.

(3) For design services to be provided as part of design-build-operate-maintain and design-build-finance-operate-maintain procurements. A governmental body shall include in the solicitation for design-build-operate-maintain and design-build-finance-operate-maintain such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the head of a governmental body, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build-operate-maintain and design-build-finance-operate-maintain contracts in excess of \$25,000,000.

(4) For Construction Management (Agency) services. A governmental body shall include in the solicitation for construction management agency services such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage.

(5) Errors and omissions (or professional liability) insurance coverage for construction management services is typically not required when the governmental body is conducting a construction management at-risk procurement.

### M. Other Security; Operations Period Performance Bonds.

#### (1) Purpose.

To assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services, the governmental body shall identify, in the solicitation, one or more of the other forms of security identified in Section 11-35-3037 that shall be furnished to the governmental body by the offerors (or bidders) in order to be considered to be responsive.

#### (2) Operations Period Performance Bonds.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each offeror shall demonstrate in its offer that it is prepared to provide, and upon award of the contract, to maintain in effect an operations period performance bond that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in the amount of 100% of that portion of the contract price that includes the cost of such operation and maintenance services during the period covered by the bond. In those procurements in which the contract period for operation and maintenance is longer than 5 years, the procurement officer may accept an operations period performance bond of five years’ duration, provided that such bond is renewable by the contractor every five (5) years during the contract, and provided further, that the contractor has made a firm contractual commitment to maintain such bond in full force and effect throughout the contract term.

(b) The operations period performance bond shall be delivered by the contractor to the governmental body at the same time the contract is executed. If a contractor fails to deliver the required bond, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, award of the contract shall be made to the next ranked bidder (or offeror), or the contractor shall be declared to be in default, as otherwise provided by these regulations.

(c) Operations period performance bond shall be in a form to be specified in the Manual for Planning and Execution of State Permanent Improvement, Part II. Each bond shall be issued by a Surety Company licensed in South Carolina with an “A” minimum rating of performance as stated in the most current publication of “Best Key Rating Guide, Property Liability”, which company shows a financial strength rating of at least five (5) times the bond amount.

#### (3) Letters of Credit to Cover Interruptions in Operation.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each offeror shall demonstrate in its offer that it is prepared to post,



and upon award of the contract shall post, and in each succeeding year adjust and maintain in place, an irrevocable letter of credit with a banking institution in this State that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the next 12 months.

(b) The letter of credit required under this Section shall be posted by the contractor at the same time the contract is executed, and thereafter, shall be annually adjusted in amount and maintained by the contractor. If an offeror or bidder fails to demonstrate in its offer that it is prepared to post the required letter of credit, the bid (or offer) shall be rejected, the bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror), as otherwise provided by these regulations. If the contractor fails to place and maintain the required letter of credit, the contractor shall be declared to be in default, as otherwise provided by these regulations.

(c) If required by the solicitation, letters of credit shall be in a form to be specified in the Manual for Planning and Execution of State Permanent Improvement, Part II.

(4) Guarantees.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, the contractor and affiliated organizations (including parent corporations) shall provide a written guarantee that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the contract period.

(b) The written guarantee required under this Section shall be submitted by each offeror at the time the proposal is submitted. If the contractor fails to submit the required guarantee, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror) as otherwise provided by these regulations.

(c) If required by the solicitation, guarantees shall be in a form to be specified in the Manual for Planning and Execution of State Permanent Improvement, Part II.

N. Construction Management At-Risk.

(1) Absent the approval required by Section 11-35-2010, a contract with a construction manager at-risk may not involve cost reimbursement.

(2) Prior to contracting for a GMP, all construction management services provided by a construction manager at-risk must be paid as a fee based on either a fixed rate, fixed amount, or fixed formula.

(3) As required by Section 11-35-3030(2)(a)(iv), construction may not commence until the bonding requirements of Section 11-35-3030(2)(a) have been satisfied. Subject to the foregoing, bonding may be provided and construction may commence for a designated portion of the construction.

(4) In a construction management at-risk project, construction may not commence for any portion of the construction until after the governmental body and the construction manager at risk contract for a fixed price or a GMP regarding that portion of the construction. Prior to executing a contract for a fixed price or a GMP, a governmental body shall comply with Section 11-35-1830 and Regulation 19-445.2120, if applicable. For purposes of Section 11-35-1830(3)(a), adequate price competition exists for all components of the construction work awarded by a construction manager at-risk on the basis of competitive bids.

(5) When seeking competitive sealed proposals in a construction management at-risk procurement, the solicitation shall include a preliminary budget, and if applicable, completed programming and the conceptual design. The solicitation shall request information concerning the prospective offeror's qualifications, experience, and ability to perform the requirements of the contract, including but not limited to, experience on projects of similar size and complexity, and history of on-time, on-budget, on-schedule construction. The offeror's proposed fee may be a factor in determining the award.

(6) After all preconstruction services and final construction drawings have been completed, or prior thereto upon written determination by the procurement officer, a governmental body must negotiate with and contract for a GMP with a construction manager at-risk. If negotiations are unsuccessful, the governmental body may issue an invitation for bids, as allowed by this code, for the remaining construction.

### 30 FINAL REGULATIONS

(7) A governmental body shall have the right at any time, and for three years following final payment, to audit the construction manager at-risk to disallow and to recover costs not properly charged to the project. Any costs incurred above the GMP shall be paid for by the construction manager at-risk.

(8) A construction manager at-risk may not self-perform any construction work for which subcontractor bids are invited, unless no acceptable bids are received or a subcontractor fails to perform. Ordinarily, the contract with a construction manager at-risk should require the construction manager at-risk to invite bids for all major components of the construction work. Section 11-35-4210 does not apply to any subcontractor bid process conducted by a construction manager at-risk.

19-445.2150. Surplus Property Management.

#### A. Definition, Authority and Mission.

(1) [Remains the same.]

(2) Authority.

The disposition of all surplus property shall be conducted by the ~~Division of General Service~~ Division's Surplus Property Management Office (SPMO) at such places and in such manner determined most advantageous to the State, except as defined in Section 11-35-1580 of the Procurement Code. All government bodies must identify surplus items and declare them as such, and report them in writing to the ~~SPMO Materials Management Officer or the Information Technology Management Officer (ITMO), or the designee of either,~~ SPMO, within one hundred and eighty (180) days from the date they become surplus. The SPMO shall deposit the proceeds from such disposition, less expense of the disposition, in the State's General Fund unless a government body makes a written request to retain such proceeds, less cost of disposition, for the purchase of like kind property and the ~~Materials Management Officer or ITMO~~ SPMO, or ~~the his designee of either,~~ approves such request.

(3) Mission.

The primary mission of the Surplus Property Management ~~Program Office~~ shall be to receive, warehouse and dispose of the State's surplus property in the best interest of the State. The central warehousing of State surplus property will allow all State governmental bodies and other political subdivisions one location to acquire needed property ~~which otherwise might escape the system and be sold to the public.~~

The purpose of this program is to provide the following:

1. elimination of costs related to the warehousing, insurance and accounting systems necessary to fulfill an agency's surplus property responsibility,
2. maximization of proceeds by disposing of property as soon as possible after it becomes excess to an agency's needs,
3. establishment of priorities in the disposal process that encourage keeping assets in public use as long as possible,
4. conversion of unneeded fixed assets into available funds on a timely basis ~~for offsetting the cost of new like equipment.~~

#### B. Reporting and Relocation of Surplus Property.

(1) Reporting.

Within ~~ninety (90)~~ one hundred eighty (180) days from the date property becomes surplus, it must be reported to the SPMO on a turn-in document (TID) designed by the SPMO. The description, model or serial number, acquisition cost, date of purchase and agency ID number shall be listed for each item.

Upon receipt of the TID, the SPMO will screen the property to determine whether it is surplus or junk as defined in these regulations.

## (2) Property Relocation.

Surplus property reported shall be scheduled for relocation to the SPMO, Boston Avenue, West Columbia; or, upon consultation and agreement with the generating governmental body, remain at the governmental body's site if deemed by the SPMO to be a more cost-effective method for disposal. ~~All costs associated with relocation of property will be borne by the SPMO, except property as defined in these regulations under Subsection C, Item 2, A and B.~~

At such time as property is officially received by the SPMO, title will pass to the ~~Division of General Services'~~ Division and shall be accounted for as described herein. Governmental bodies shall delete insurance coverage on such property. The SPMO shall carry sufficient insurance to ensure these assets are safeguarded against loss. Governmental bodies shall delete such property from their fixed asset records at this point of transfer.

Upon disposal of the property, the proceeds, less cost of disposition, will be returned to the authorized revenue center if so requested and authorized in accordance with these regulations.

If determined to be junk, disposal will be the responsibility of the generating governmental body in accordance with Section 11-35-4020 of the Procurement Code.

## C. Transfer of Surplus Property to Governmental Bodies, Political Subdivisions, and Eligible Nonprofit Health or Education Institutions.

### (1) Eligibility.

The SPMO's primary role shall be to relocate surplus property to eligible Donees which includes governmental bodies, political subdivisions and nonprofit health and educational institutions. ~~The Manager of Supply and Surplus Property Management shall be responsible for determining an applicant's eligibility prior to any transfer of property.~~

The term governmental bodies means any State government department, commission, council, board, bureau, committee, institution, college, university, technical school, legislative body, agency government corporation, or other establishment or official of the executive, judicial, or legislative branches of the State. The term political subdivisions includes counties, municipalities, school districts or public service or special purpose districts. The term eligible nonprofit health or educational institutions means tax-exempt entities, duly incorporated as such by the State. SPMO shall be responsible for determining an applicant's eligibility prior to any transfer of property. Governmental body excludes the General Assembly and all local political subdivisions such as counties, municipalities, school districts or public service or special purpose districts.

~~The term political subdivisions includes counties, municipalities, school districts or public service or special purpose districts.~~

~~The term eligible nonprofit health or educational institutions means tax exempt entities, duly incorporated as such by the State.~~

The SPMO will maintain sufficient records to support the eligibility status of these entities.

## 32 FINAL REGULATIONS

### (2) Determination of Sale Price.

The sale price for all items will be established by the Manager of ~~Supply and Surplus Property Management~~, or the Manager's designee. The Manager or the Manager's designee shall have the final authority to accept or reject bids received via public sale. The following categories and methods will be used:

(a) Vehicles: NADA loan value shall be used for the sale price. In certain instances, the most recent public sale figures and consultation with the generating governmental body shall be the basis for a sale price.

(b) Boats, motors, heavy equipment, farm equipment, airplanes and other items with an acquisition cost in excess of \$5,000: The sale price shall be set from the most recent public sale figures and/or any other method necessary to establish a reasonable value including consultation with the generating governmental body.

(c) Miscellaneous items with an acquisition cost of \$5,000 or less such as office furniture and machines, shop equipment, cafeteria equipment, etc.: A sale price will be assessed ~~in accordance with~~ based on the current fair-market conditions. ~~value.~~

### (3) Terms and Conditions on Property Transferred from Warehouse.

For any purchases made under this subsection, the purchasing entity will certify that all items acquired will be for the sole benefit of the buying institution and that no personal use will be involved. This certification will be formalized by the agreement signed at the time eligibility is established. The following terms and conditions will be set forth therein:

(1) Property must be placed into public use within one (1) year of acquisition and remain in use one (1) year from the date placed into actual use.

(2) Property which becomes unusable may be disposed of prior to the one-year limitation with the approval of the SPMO.

A utilization visit may be made by authorized personnel of the SPMO. All vehicles and property with an acquisition cost in excess of \$5,000 require a utilization review during the twelve-month period from date of transfer to ensure the property is in public use.

(A) Any misuse of property will be reported in writing to the SPMO's ~~State Surplus Property Manager Supervisor or his successor~~ by the utilization staff of the SPMO. ~~The State Surplus Property SPMO Manager Supervisor or his successor will consult with the designee of the Materials Management Officer or the ITMO who~~ shall have the authority to suspend all further purchases until a determination can be made under Subsection B. If warranted, the matter shall be referred to the proper law enforcement authority for full investigation.

(B) Upon determination that misuse of property has occurred, purchasing privileges will be terminated and not restored until the buying governmental body, political subdivision, or nonprofit health or educational institution pays to the SPMO the fair market value of the item(s) misused or returns the misused property to the SPMO.

### (4) Disposition Cycles for Surplus Property.

An appropriate cycle methodology as determined in the SPMO's sole discretion shall be used for the disposal process of surplus property, ~~beginning with the Monday (if this is a state holiday, the cycle will begin on the first business day of the week) following the week during which the property is processed by the SPMO.~~

Governmental bodies, political subdivisions and nonprofit health and educational institutions, and any other qualifying donees will be given priority over the general public to acquire the property.

Special items and heavy equipment, will generally follow the same disposal procedures as other property. When vehicles are the items in question, they will be held for two weeks to allow State agencies purchasing priority. ~~However, the SPMO shall have the right to deviate from these procedures if it is in the best interest of the state. In cases where cost avoidance, space requirements, accessibility and manpower are considerations,~~ However, the SPMO shall have the authority to deviate from these procedures in circumstances where cost avoidance, space requirements, market conditions, accessibility and manpower are considerations. bypass individual sales to the general public and offer these items to eligible donees first and, if not disposed of, then dispose of them through public auction. The SPMO must document that such procedure is advantageous to the State.

#### D. Public Sale of Surplus Property.

##### (1) Public Sale Cycle.

Upon completion of ~~an appropriate distribution~~ the Donee sales cycle, the remaining items shall be made available to the public. Donees and the general public may purchase in this period, but without priority. This period has no minimum or maximum length and is determined by warehouse space and scheduled incoming property. There will also be times when property will not be made available for a Public Cycle Sale.

##### (2) Final Disposition by Competitive Public Sale.

~~Upon completion of the public sale cycle, all surplus property shall be offered through competitive sealed bids or public auction.~~

When surplus property is sold via the competitive sealed bid process, notification of such sale shall be given through a Notice of Sale to be posted at the SPMO at least fifteen (15) days prior to the bid opening date. The sale shall also be announced through advertisement in newspapers of general circulation, ~~and/or the South Carolina Business Opportunities publication~~ and such electronic or other media as deemed appropriate by the SPMO. The Notice of Sale shall list the supplies or property offered for sale; designate the location and how property may be inspected; and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly.

Award shall be made in accordance with the provisions set forth in the Notice of Sale and to the highest responsive and responsible bidder provided that the price offered by such bidder is deemed reasonable by the SPMO or his designee of the MMO or ITMO, or his designee. Where such price is not deemed reasonable, the bids may be rejected in whole, or in part, and the sale negotiated beginning with the highest bidder provided the negotiated sale price is higher than the highest responsive and responsible bid. In the event of a tie bid the award will be made in accordance with the tie bid procedure set forth in Section 11-35-1520(9) of the Consolidated Procurement Code.

Property may also be sold at a public auction by an experienced auctioneer. The Notice of Sale shall include, at a minimum, all terms and conditions of the sale and a statement clarifying the authority of the SPMO designee of the MMO or ITMO, or his designee, to reject any and all bids. These auctions will be advertised in a newspaper of general circulation or on the radio, or both.

##### (3) Other Means of Disposal.

Some types and classes of items can be sold or disposed of more economically by some other means of disposal including barter, appraisal, electric commerce and web based sales. In such cases, and also where the nature of the supply or unusual circumstances necessitate its sale to be restricted or controlled, the ~~Materials~~

## 34 FINAL REGULATIONS

~~Management Officer~~SPMO may employ such other means, ~~including but not limited to appraisal,~~ provided the ~~Materials Management Officer~~SPMO makes a written determination that such procedure is advantageous to the State.

(4) [Remains the same.]

E. [Remains the same.]

F. Inventory and Accounting Systems.

(1) Forms.

Turn-in documents designed by the ~~Surplus Property Office~~SPMO shall be used by all governmental bodies for reporting surplus property to the SPMO. It shall be the responsibility of the generating governmental body to obtain these forms and to furnish all information required on the form. Items received by the SPMO shall be physically checked by the SPMO against the turn-in document and a signed receipt issued to the governmental body.

(2) Tagging.

Items received by the SPMO shall be assigned an inventory number and data including generating governmental body, ~~name,~~ description of property, quantity, original acquisition cost, ~~date purchased, serial or model number~~ and other relevant information entered into an automated inventory system. Inventory tags listing all necessary information shall be attached to each item.

(3) [Remains the same.]

(4) [Remains the same.]

(5) Invoicing.

Invoices shall be generated and mailed to the acquiring agency. All cash and accounts receivable transaction records shall be properly maintained. All transfers of funds to various accounts will be performed in accordance with these regulations.

(6) [Remains the same.]

(7) Property sold to the public shall be paid for in full at the time of purchase.

Transactions shall be documented by a Bill of Sale enumerating all conditions of the sale i.e., "as is, where is," etc. and must be signed by the purchaser. Personal checks with proper identification, certified checks, or money orders made payable to the State of South Carolina or cash or credit cards shall be accepted as a form of payment. A copy of the Bill of Sale shall be presented to the purchaser as a receipt, ~~and a copy along with the payment shall be forwarded to the Internal Operations Cashier. Two copies shall be retained internally by the SPMO, one as the source document for updating the computer records and the other for filing.~~

G. Trade In Sales.

Governmental bodies may trade in personal property, whose original unit purchase price did not exceed \$5,000, the trade in value of which must be applied to the purchase of new items. When the original unit purchase price exceeds \$5,000, the governmental body shall refer the matter to the ~~Materials Management Officer, the ITMO~~SPMO, or the ~~his~~ designee of either, for disposition.

The ~~Materials Management Officer or the ITMO~~SPMO, or ~~the his~~ designee of either, shall have the authority to determine whether the property shall be traded in and the value applied to the purchase of new like items or classified as surplus and sold in accordance with the provisions of Section 11-35-3820 of the Procurement Code. When the original purchase price exceeds \$100,000, the ~~Materials Management Officer, the ITMO~~SPMO, or ~~the his~~ designee of either, shall make a written determination as to its reasonableness and document such trade-in transaction.

#### H. Definition ~~and Sale~~ of Junk.

Junk is State-owned supplies and equipment having no remaining useful life in public service ~~or and~~ the cost to repair or to refurbish the property ~~in order to return it to public use would exceed~~ the value of like used equipment, or the cost of transporting the property for sale exceeds the likely recovery from a sale. with remaining useful life. Property that may be recycled is not considered junk. The classification of property as junk is at the sole discretion of the SPMO.

#### I. Unauthorized Disposal.

(1) [Remains the same.]

(2) Corrective Action and Liability.

In all cases, the head of the ~~governmental body~~ disposing agency shall prepare a written determination describing the facts and circumstances surrounding the act, corrective action being taken to prevent recurrence, and action taken against the individual committing the act and shall report the matter in writing to the ~~Surplus Property Management~~SPMO within ten (10) days after the determination.

#### J. [Remains the same.]

#### **Fiscal Impact Statement:**

No additional state funding is requested. The State Budget and Control Board estimates that no additional costs will be incurred by the State and its political subdivisions in complying with the proposed revisions to Regulation 19-445.

#### **Statement of Rationale:**

As originally enacted in 1981, the Consolidated Procurement Code was largely adapted from the American Bar Associations Model Procurement Code for State and Local Governments and the accompanying model regulations. In 2000, the ABA adopted a revised model, the 2000 Model Procurement Code. In 2002, the ABA adopted updates to the accompanying model regulations. Many of the changes to these model documents regard construction. Senate Bill 282, currently pending before the General Assembly, would amend the Consolidated Procurement Code by adopting many of these changes. In addition, the Consolidated Procurement Code expressly contemplates the continued development of explicit and thoroughly considered procurement policies and practices. The proposed changes are needed to accommodate these developments and to further consolidate, clarify, and modernize the law governing procurement in this State. S.C. Code Section 11-35-20(d).